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SUPREME COURT, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1972

No. 71-1315

HOWARD ALEXANDER, FRANK COLLIER,
VILLAGE BOOKS INC., MEDIA ARTS,
and GUILD PRESS, LTD.

Petitioners

v.

COMMONWEALTH OF VIRGINIA

Respondent

PETITIONERS' BRIEF

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PETITIONERS' BRIEF

OPINIONS BELOW

The unreported Memorandum of the Court of Hustings for the City of Portsmouth, dated November 20, 1970, appears in the Appendix attached to the Petition for Writ of Certiorari herein, at Appendix Page 16a. The Unreported Order of the Court of Hustings for the City of Portsmouth appears in the Appendix attached to the Petition for Writ of Certiorari herein, at Page 18a. The Opinion of the Supreme Court of Virginia appears in the Appendix attached to the Petition for Writ of Certiorari herein, at Appendix Page 1a and is reported at 212 Va. 554, 186 S.E.2d 43 (1972).

JURISDICTION

The final Judgment and Order of the Court of Hustings for the City of Portsmouth was entered on December 30, 1970, pursuant to §18.1-236.3 of the Code of Virginia (1950). The Opinion of the Supreme Court of Virginia, affirming the Court of Hustings for the City of Portsmouth, was entered on January 17, 1972. The jurisdiction of this Court was invoked under Title 28, U.S. Code, §1257, (2,3); §1201(c). A Writ of Certiorari to the Supreme Court of Virginia was issued by the Supreme Court of the United States on June 26, 1972.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The pertinent provisions of the First, Fifth, Sixth, Seventh and Fourteenth Amendments to the Constitution of the United States of America appear in the Appendix to the Petition for Writ of Certiorari herein, at Pages 23a and 24a. Section 18.1-236.3 of the Code of Virginia, appears in the Appendix to the Petition for Writ of Certiorari herein, at Pages 19a through 22a.

QUESTIONS PRESENTED

I. Is §18.1-236.3 of the Annotated Code of Virginia repugnant to the Constitution of the United States of America by prohibiting a jury trial to determine obscenity and by permitting a prior restraint on literary material, and by providing for a city-wide community standard for judging obscenity rather than a national community standard, and by providing for establishing a fact, through civil proceedings, for use in a criminal prosecution, all in violation of the First, Fifth, Sixth,

Seventh, and Fourteenth Amendments to the Constitution of the United States of America?

II. Are the approximately 338 books and magazines, enjoined from sale by the Court below, obscene in the constitutional sense without sale or exhibition to juveniles, obtrusive advertising or pandering?

III. Whether the display of any sexually oriented pictorial magazines for commercial sale, when surrounded by notice to the public of their nature and by reasonable protection against exposure of the magazines to juveniles, is constitutionally protected?

STATEMENT OF THE CASE

On May 19, 1970, the Commonwealth's Attorney for the City of Portsmouth, presented a Petition to the Court of Hustings for the City of Portsmouth, asking that certain books named in the Petition be adjudged obscene as provided by § 18.1-236.4 of the Annotated Code of Virginia. The Court of Hustings for the City of Portsmouth issued a Subpoena Duces Tecum to the Petitioners, Howard Alexander and Frank Collier, both employees of the "adult" bookstore in the City of Portsmouth, Virginia, operated by the Petitioner, Village Books, Inc. The Subpoena commanded their appearance on May 22, 1970, in the Court of Hustings for the City of Portsmouth and to produce approximately 400 different books and magazines, which constituted 99% of the literature offered for sale at the Petitioner's adult bookstore in the City of Portsmouth. A Motion to Quash the Subpoena Duces Tecum, was overruled and the books were taken by the Commonwealth Attorney.

On June 3, 1970, the Court of Hustings for the City of Portsmouth issued a Rule to Show Cause, why approximately 338 of the books should not be adjudicated

obscene pursuant to the Petition for an Order to Declare the Books Obscene; the Order to Show Cause was returnable July 17, 1970.

The Commonwealth Attorney for the City of Portsmouth on June 3, 1970, filed a Petition for an Order Temporarily Restraining the Sale or Distribution of Certain Books, being the books named in the Show Cause Order of the same date of the Court of Hustings for the City of Portsmouth. The Commonwealth Attorney gave notice to the Petitioners that the Court of Hustings would act upon the Petition for a Temporary Restraining Order on June 12, 1970. On the latter date, the Petitioners appeared through counsel, to request a Stay of the Court's actions upon the Petition for a Temporary Restraining Order, upon the ground that an adversary hearing had not been afforded to the Petitioners upon the issue of obscenity of the books and magazines, and the adversary hearing being set for July 17, 1970, by the Show Cause Order. The Court of Hustings for the City of Portsmouth denied the Petitioners' Motion for a Stay, but continued the hearing on the Petition for an Order Temporarily Restraining the Sale or Distribution of the questioned books and magazines.

The Petitioners filed an Answer to the Petition for an Order Adjudicating the books to be obscene and a Motion to Dismiss the Petition, which Motion was heard by the Court of Hustings on August 19, 1970. The Petitioners requested a trial by jury, which Motion was denied (A. 14), as was the Petitioners' Motion to Dismiss, and the case was tried by the Court of Hustings for the City of Portsmouth, without a jury, on November 4th and 5th, 1970.

At the trial, it was stipulated that the Petitioners' "adult" bookstore did not sell or distribute any literature

to juveniles, (A. 20). The Court of Hustings for the City of Portsmouth, at the outset, directed the return of the books which it had previously determined there was no probable cause to be believed obscene and the case proceeded upon the remaining approximately 338 books and magazines. The City of Portsmouth introduced as a witness an insurance salesman, Mr. Robert L. Holly, in an effort to establish the community standards of acceptance of comparable erotic literature for Portsmouth, Virginia. Mr. Holly had been a resident of the City of Portsmouth for fifteen years, (A. 21), and five to seven years earlier he had served as Chairman of an area-wide Chamber of Commerce Committee. The purpose of the Committee was to investigate obscene materials in the Tidewater area, (A. 25). The Committee purchased magazines at different locations throughout the community and discussed the magazines with diverse civic groups and organizations to determine what the community standard was for the Tidewater area at that time, (A. 23). Approximately one and one-half (1 ½) years prior to the trial, the witness did an extensive investigation into obscenity in the Portsmouth area, conducting a survey which took samples of the Portsmouth population of approximately 30,000 people, (A. 23-24). The witness met with various clubs and organizations in the area, displayed magazines and films depicting sex; among these clubs were the Navy Wives' Club, which included females from various parts of the United States, (A. 25). Mr. Holly was permitted by the Court of Hustings to testify as an expert on community standards, (A. 34-35), and stated his opinion that generally the books and magazines at issue exceeded the community standards of erotic materials, (A. 39). Mr. Holly was of the opinion that the local community standard was essentially the same as the

national standard. His opinion concerning the national standard was based upon his travel on the East Coast and in talking with people from throughout the country, (A. 26, 29-30). Mr. Holly had not been in an "adult" bookstore in recent years and although he was not established as an expert in any other field, Mr. Holly was permitted to testify regarding his opinion of the prurient appeal and social value of the questioned books and magazines, (A. 40). He was of the opinion that the majority of the books and magazines were patently offensive, did not meet community standards, and taken as a whole appealed to prurient interests in sex and did not have any redeeming social value. He did not differentiate which books or magazines he was referring to as having redeeming social value, however, he was of the opinion that none of the books and magazines could be considered, "hard core pornography", (A. 43). The witness considered the portrayal of sexual organs in photographs simulating sexual activities as exceeding the community standards, (A. 42, 44-45).

The Commonwealth next offered the testimony of Dr. Donald Lee Mingione, a psychiatrist, who was of the opinion that the majority, if not all of the books, appealed to the prurient interest, (A. 48-49). He further testified that none of the books possessed any redeeming social vlaue, (A. 51). He considered a prurient interest appeal to be an appeal to sexual arousement, (A. 48, 51).

The Commonwealth then introduced as a witness Mr. Richard Messenger, the proprietor of a printing establishment, who does printing for the Government and for firms outside the State of Virginia. Mr. Messenger testified that he relied upon bulletins from the National Association of Printers to ascertain what he should be

permitted to print, (A. 54, 60). The witness also was a Captain of the Auxiliary Police Force of the City of Portsmouth, (A. 54), and he was of the opinion that the various books and magazines would appeal to the prurient interest, which he considered mere sexual arousal, (A. 55). Mr. Messenger was of the opinion that several of the books and magazines were obscene, (A. 56). He testified that there was social value for art students in several of the magazines, (A. 57), and that more than one-half of the books and magazines involved would not be obscene, (A. 57). His determination of the prurient appeal of the magazines was determined upon the effect of the books and magazines upon "young persons" under nineteen years of age, (A. 59-60), not adults.

Following the denial of the Petitioners' Motion to Strike, (A. 64-65), the Petitioners offered the testimony of Dr. Wilbur Hammon, a United States Government psychiatrist, employed at St. Elizabeth's Hospital in Washington, D.C., and engaged in the private practice of medicine specializing in psychiatry, in the State of Virginia, (A. 65-66). Dr. Hammon was of the opinion that the books and magazines involved would not appeal to the prurient interest of the average viewer, (A. 68), although they only had a limited social value, (A. 70-71), and that the magazines did not constitute hard core pornography, (A. 73).

Thereafter, the Petitioners presented the testimony of Dr. Donald Nachand, a practicing psychologist, employed at the Eastern Shore State Hospital in Cambridge, Maryland, (A. 82), who was of the opinion that the books and magazines would not appeal to the prurient interest of the average viewer, (A. 83), and that they did not exceed national community standards of tolerance in

the acceptance of erotic materials and that they had redeeming social value, (A. 83-84). Dr. Nachand agreed with the prior witnesses that the books and magazines could not be considered "hard core pornography", (A.84).

The Petitioners attempted to present to the Court of Hustings the Presidential Commission Report on Pornography, (A. 88), which the Court would not consider.

The Petitioners also offered the testimony of Dr. Herman Kastner, a psychiatrist engaged in private practice in the State of Maryland, who was of the opinion that the challenged books and magazines would not appeal to the prurient interest of the average person in the community, (A. 95), and that the literature did contain socially redeeming material, (A. 96-97), and that the magazines which contained photographs of simulated sexual activities would not necessarily appeal to the prurient interest of the average person, (A. 103).

At the conclusion of the testimony, the Petitioners again moved the Court to enter judgment in their favor, which Motion was denied.

On November 20, 1970, the Court issued a Memorandum declaring all of the books and magazines to be obscene and on December 30, 1970, the Court of Hustings for the City of Portsmouth, entered an Order adjudicating all of the books and magazines to be obscene and enjoining the sale of all the approximately 338 books and magazines.

The Petitioners appealed to the Supreme Court of Virginia, which Court on January 17, 1972, affirmed the action of the Court of Hustings for the City of Portsmouth, which Opinion is reported at 212 Va. 554, 186 S.E.2d 43, and is printed in the Appendix attached to the Petition for Writ of Certiorari herein, at Appendix Page 1a.

ARGUMENT

I.

Is § 18.1-236.3 of the Annotated Code of Virginia Repugnant to the Constitution of the United States of America by Prohibiting a Jury Trial to Determine Obscenity and by Permitting a Prior Restraint on Literary Material, and by Providing for a City-wide Community Standard for Judging Obscenity Rather Than a National Community Standard, and by Providing for Establishing a Fact, Through Civil Proceedings, for Use in a Criminal Prosecution, All in Violation of the First, Fifth, Sixth, Seventh, and Fourteenth Amendments to the Constitution of the United States of America?

Section 18.1-236.3 of the Code of Virginia is repugnant to the Constitution of the United States of America as follows,

FIRST, DENIAL OF TRIAL BY JURY:

Subsection 8 of the Virginia Code provides in pertinent part "If an appearance is entered and an answer filed, the Court shall order the proceedings set on the calendar for a prompt hearing. The Court shall conduct hearing in accordance with the rules of civil procedure applicable to the trial of cases by the Court without a jury". In the Court of Hustings for the City of Portsmouth, Petitioners demanded a trial by jury, (A. 14), which motion was denied by the Court. This Court in *Roth v. U.S.*, 354 U.S. 476, at 492 n. 30, determined that a jury trial is constitutionally mandated to determine the issue of obscenity under the First Amendment to the Constitution of the United States of America in a criminal prosecution. This Court did not reach the issue of whether a jury trial is mandated by the First Amendment

in a civil obscenity proceeding, in its determination of the constitutionality of the New York State Statute in *Kingsley Books, Inc. v. Brown*, 354 U.S. 436, decided the same day as *Roth v. U.S.*, supra. This argument was developed in the dissenting opinion of Mr. Justice Brennan at Page 448,

> "In *Alberts v. California*, and *Roth v. United States*, decided today 1 L. Ed. 2d 1498, the Court held to be constitutional the following standard for judging obscenity—whether to the average person, applying contemporary community standards, the dominant theme of the material taken as a whole appeals to prurient interest. The statutes there involved allowed a jury trial of right, and we did not reach the question whether the safeguards necessary for securing the freedoms of speech and press for material not obscene included a jury determination of obscenity.
>
> The jury represents a cross-section of the community and has a special aptitude for reflecting the view of the average person. Jury trial of obscenity therefore provides a peculiarly competent application of the standard for judging obscenity which, by its definition, calls for an appraisal of material according to the average person's application of contemporary community standards. A statute which does not afford the defendant, of right, a jury determination of obscenity falls short, in my view, of giving proper effect to the standard fashioned as the necessary safeguard demanded by the freedoms of speech and press for material which is not obscene. Of course, as with jury questions generally, the trial judge must initially determine that there is a jury question, i.e., that reasonable men may differ whether the material is obscene."

Petitioners argue that only a jury, under proper instruction from the Court, can render a proper judgment in an obscenity determination. Petitioners have been involved in numerous cases and have learned from bitter experience that Judges, too often overly sensitive to public opinion and concerned with re-election, maintain too keen a view of the majority stand without proper consideration for the minority viewpoint historically protected by the First Amendment. In the case of *Village Books v. Arthur Marshall*, 263 Md. 76, 282 A.2d 126, Petition for Writ of Certiorari pending, Case No. 71-739, this unfortunate fact was clearly illustrated when the book "Auto Fellatio and Masturbation" was condemned by a judge in an equity proceeding. This same book having been acquitted whenever it was presented to a jury for consideration. Petitioners argue that a single judge may, because of religious sentiments, also have personal prejudice against pictorial representation of nudity which overcomes his ability to fairly decide the vital First Amendment issues. Prospective jurors with such preconceived opinions may be ferreted out on Voire Dire examination and eliminated from the petty jury. It is too great a burden to place upon a single judge, in a small city such as Portsmouth, Virginia, to adjudicate as not obscene, books and magazines which are unpopular with the majority of the members of his church and community, who may be called upon to decide the issue of his re-election. Thereupon, Petitioners argue that the First Amendment to the Constitution of the United States of America which historically has protected the minority viewpoint, as made applicable to the State of Virginia by the Fourteenth Amendment to the Constitution of the United States of America, *Mapp v. Ohio*, 367 U.S. 643, mandates a trial by jury on the issue of obscenity in a civil proceeding as well as in a criminal proceeding.

SECOND, PRIOR RESTRAINT OF LITERARY MATERIAL:

Petitioners argue that Subsection 5 of the Code of Virginia, permits a prior restraint of literary material by authorizing a temporary restraining order prohibiting the dissemination of alleged obscene books and magazines without providing for any adversary hearing on the issue of obscenity prior to the restraint. The Code of Virginia does not provide any time limit for the extent of the prior restraint other than the direction, as provided in Subsection 8 of the Code of Virginia, that in the event an appearance is entered and an Answer filed, the Court shall order the proceeding upon the Order to Show Cause set on the calendar for a prompt hearing. There are none of the safeguards which this Court approved in *Kingsley Books, Inc. v. Brown,* 354 U.S. 436, at 438,

> "... Appellants consented to the granting of an injunction pendente lite and did not bring the matter to issue promptly, as was their right under subdivision 2 of the challenged section, which provides that the persons sought to be enjoined 'shall be entitled to a trial of the issues within one day after joinder of issue and a decision shall be rendered by the court within two days of the conclusion of the trial' ".

There is no provision in the Virginia Code for the prompt final judicial determination which this Court found to be constitutionally required in *Teitel Film v. Chicago,* 390 U.S. 139, at 141,

> "In *Freedman v. Maryland,* 380 U.S. 51, 58-59, 13 L. ed 2d 649, 654, 655, 85 S. Ct. 734, we held '... that a noncriminal process which required the prior submission of a film to a censor avoids constitutional infirmity only if it takes place under procedural safeguards designed to obviate the

dangers of a censorship system. . . To this end, the exhibitor must be assured, by statute or authoritative judicial construction, that the censor will, within a *specified brief period*, either issue a license or go to court to restrain showing the film. . . [T]he procedure must also assure a *prompt final judicial decision*, to minimize the deterrent effect of an interim and possibly erroneous denial of a license.' (Emphasis supplied.) The Chicago censorship procedures violate these standards in two respects. (1) The 50 to 57 days provided by the ordinance to complete the administrative process before initiation of the judicial proceeding does not satisfy the standard that the procedure must assure 'that the censor will, within a specified brief period, either *issue a license or go to court to restrain showing the film'. (2) The absence of any provision for a prompt judicial decision by the trial court violates the standard '. . . the procedure must also assure a prompt final judicial decision. . .' ".

As the statute was applied in this case, the Petition for Order Temporarily Restraining the Sale or Distribution of Certain Books was filed June 3, 1970, and notice of hearing was given for June 12, 1970, (Appendix to Petition for Writ of Certiorari herein, Pages 4a through 6a). If the Petitioners had not filed a Declaratory Judgment and Injunction action in the United States District Court for the Eastern District of Virginia, Norfolk Division, it is safe to say that the Temporary Restraining Order would have been passed by the Court of Hustings for the City of Portsmouth no later than June 13, 1970 and the restraint would have remained to the present. The Court of Hustings heard testimony on November 4, and November 5, 1970; it did not decide the issues of obscenity until November 20, 1970, five months after the date when the Temporary Restraining Order would have been entered.

This provision allowing the unconstitutional prior restraint was upheld by the Supreme Court of Virginia, which avoided the issue by stating, "But, no temporary restraining order was issued in this case. Even so, all prior restraint is not necessarily prohibited". Petitioners argue that the authorities cited by the Court below are not controlling. This case is not one, like *United States v. 37 Photographs*, 402 U.S. 363, in which the Customs Department of necessity are required to inspect large quantities of materials, and engage in time consuming activities required in assessing duties on imports. The books in the Court below had been perused by the Court of Hustings prior to the issuing of the Order to Show Cause and the filing of the Petition for Order Temporarily Restraining the Sale or Distribution of Certain Books, on June 3, 1970, and thereupon, Petitioners argue that this Court should not allow to stand such a statute which is so patently offensive to the right of free speech and an unfettered press protected by the First Amendment to the Constitution of the United States of America.

THIRD, LOCAL COMMUNITY STANDARDS:

This Court in *Roth v. United States*, 354 U.S. 476, espoused the definition of obscenity as follows, at 489,

> "whether to the average person, applying contemporary community standards, the dominant theme of the material taken as a whole appeals to prurient interest."

The issue of what area is to be considered the "community" has perplexed many courts. Petitioners argue that Subsection 8(b) of the Code of Virginia is repugnant to the First and Fifth Amendments to the Constitution of the United States of America, made

applicable to the State of Virginia by the Fourteenth Amendment to the Constitution of the United States of America, by establishing an improper local city-wide community area for measuring the degree of tolerance of erotic material, rather than considering the statewide or national contemporary community standard of acceptance of erotic literature. The Supreme Court of Virginia, noting that this Court had the issue under consideration in *Miller v. California*, 401 U.S. 992, stated, "We are of the opinion that a community standard is the proper standard. In light of the diversity of opinion that exists in our nation, it would be impossible to establish a workable national standard. See Chief Justice Warren's dissenting opinion in *Jacobellis v. Ohio*, 378 U.S. 184, (1964)."

In no other reported decision that Petitioners have been able to locate has the community been established as a single city as opposed to a statewide or national community standard. See *Hudson v. U.S.*, 234 A.2d 903; *In Re Gianinni*, 69 Cal. 2d 563, 446 P.2d 535; *Duggan v. Guild Theater, Inc.*, 436 Pa. 191, 258 A.2d 858; *Dunn v. State Board of Censors*, 240 Md. 249, 213 A.2d 751; *Ramirez v. State*, 430 P.2d 826; *City of Phoenix v. Fine*, 4 Ariz. App. 303, 420 P.2d 26; all following the lead of Justice Frankfurter, concurring in *Smith v. California*, 361 U.S. 147,

> "... Community standards or the psychological or physiological consequences of questioned literature can, as a matter of fact, hardly be established except through experts ... there is no external measuring rod for obscenity. Neither, on the other hand, is its ascertainment a merely subjective reflection of the taste or moral outlook of any individual judges. Since the law through its functionaries is 'applying contemporary community standards' in determining

what constitutes obscenity, Roth v. United States, 354 U.S. 476, it surely must be deemed rational, and therefore, relevant to the issue of obscenity, to allow light to be shed on what those contemporary community standards' are. Their interpretation ought not to depend solely on the necessarily limited, hit or miss, subjective view of what they are believed to be by the individual juror or judge."

The application of a local standard rather than a national standard of tolerance of erotic literature was error. Local guidelines are not appropriate, for if each of the fifty (50) states, the District of Columbia, Puerto Rico and the Virgin Islands were free to apply their own contemporary community standards for what they might proscribe as obscene, "... The constitutional limits of free expression in the nation would vary with state lines." *Pennekamp v. Florida,* 328 U.S. 331, at 335. Under this standard a book acceptable in Richmond could be condemned in Portsmouth less than seventy-five (75) miles removed. It was to avoid that kind of unthinkable result that Justice Brennan, announcing the judgment of this Court in *Jacobellis v. Ohio,* 378 U.S. 184, said, "The constitutional status of an allegedly obscene work must be determined on the basis of a national standard. It is, after all, a national constitution we are expounding,". Id. at page 195; see also the concurring opinion of Justice Harlan in *Manual Enterprises v. Day,* 370 U.S. 478, at 488.

The view has been taken that the question of obscenity must be determined on the basis of a national standard in *Excellent Publications, Inc. v. United States,* 309 F.2d 362, where the Court stated that the "Community" in terms of whose standards of decency on the issue of obscenity must be decided, is not any local community

but the national community as a whole. The view that the contemporary community standard must necessarily be uniform throughout the nation, and that a standard for one state standing alone is not sufficient, was taken in *State v. Hudson County News Company*, 41 N.J. 247, 196 A.2d 225, where the Court stated:

> "The First Amendment accepts for the Nation as a whole the basic idea that freedom of expression is a necessary guarantee in a democratic society. In determining the constitutional limits of obscenity regulation, the issue in the particular case is whether the published material falls within or without that area of expression which is the purpose of the First Amendment to protect. In resolving this issue, the Court or jury must recognize that the balancing of freedom of expression against other social values has already been made in the adoption of the First Amendment and that this basic determination cannot be re-evaluated by a de novo balancing of local social interest against that area of constitutional protection which has been established."

The First Amendment protects the entire nation, therefore, the standards to be applied under the First Amendment cannot operate in such a way as to alter the degree of protection from locality to locality. The area of expression entitled to constitutional protection cannot be broad in some parts of the country and narrow in others. If a publication comes within the protected area it cannot be suppressed any place where the First Amendment guarantee is in effect. See also *Haldeman v. United States*, 340 F.2d 59, in reversing a conviction for mailing obscene matters, the Court, in footnote 5, stated that the community standard to be applied is that of the nation as a whole and not that of a particular locality or area. To

limit the boundaries of the conception of the standard of community tolerance to an area less than the entire nation would conflict with the First Amendment, *State v. Locks*, 97 Ariz. 148, 397 P.2d 949. In *State v. Vollmer*, 389 S.W.2d 20, the State of Missouri determined that the term "community" as used in determining the standard of decency does not mean the local area involved, but relates to a national standard. See also *Flying Eagle Publication, Inc. v. United States*, 273 F.2d 799, wherein it was stated that in considering a national statute the Court should recognize that juries differ rather widely over the country at large and to give the statute some uniformity in its application and to prevent an abridgement of the freedom of the press the Court should very carefully scrutinize the material alleged to be obscene before submitting it to a jury. A statewide standard of obscenity was adopted in *McCaulley v. Tropic of Cancer*, 20 Wis.2d 134, 121 N.W.2d 545; (A Declaratory Judgment Proceeding involving the book, Tropic of Cancer), the Court pointed out that the purpose of the Wisconsin Statute left no distinction to be made between the standards of different communities within the State.

Thereupon, Petitioners argue that the Code of Virginia is unconstitutional in drawing too narrow an area for consideration of "Community" standards.

FOURTH, VAGUENESS:

Petitioners argue that Section 18.1-236.3 is unconstitutionally vague in violation of the First, Fifth, Sixth, Seventh, and Fourteenth Amendments to the Constitution of the United States of America in that Virginia Code provides for a quasi-criminal proceeding for the purpose of civilly establishing a proven fact (Knowledge

of obscenity or scienter) for use in a criminal prosecution, without affording the defendant-respondent his constitutional right to a trial by jury on all issues of fact in a criminal case. Subsection 13 of Section 18.1-236.3 of the Code of Virginia provides that the proceedings, "shall be intended only to establish scienter in cases where the establishment of said scienter is thought to be usable or desirable by the Petitioner", (The Commonwealth Attorney). At any subsequent criminal trial the introduction of a finding of the Court of Hustings for the City of Portsmouth relating to knowledge of obscenity or scienter, would clearly be unconstitutional and deny the party defendant therein, of his right to confront the witnesses against him and of his right to a jury determination of each and every issue of fact.

Section 18.1-236.3 of the Code of Virginia is unconstitutionally vague in that it provides for a temporary restraining order, but it does not provide for the issuing of a permanent injunction, restraining the sale of alleged obscene books and magazines. The Court of Hustings for the City of Portsmouth entered such a permanent injunction order herein, which Petitioners argue was an unconstitutional infringement upon their rights protected by the First, Fifth and Fourteenth Amendments to the Constitution of the United States of America. This void in the grant of authority to the Court of Hustings for the City of Portsmouth is apparent when Subjection 13 of the Virginia Code is considered in relation to Subsection 11, which refers only to "temporary restraining order", and the Virginia Code is devoid of any authority to permanently enjoin the dissemination of literary materials. This unconstitutional usurping of authority by the Court of Hustings for the City of Portsmouth, and the denial of the Petitioners' rights protected by the Constitution of the United States of America, should not be countenanced by this Court.

II.

Are the Approximately 338 Books and Magazines, Enjoined from Sale by the Court Below, Obscene in the Constitutional Sense Without Sale or Exhibition to Juveniles, Obtrusive Advertising or Pandering?

Petitioners argue that all of the approximately 338 books and magazines are protected by the First Amendment to the Constitution of the United States of America, made applicable to the State of Virginia by the Fourteenth Amendment to the Constitution of the United States of America, and that the decision of the Court of Hustings for the City of Portsmouth was contrary to the law and the evidence. All of the witnesses who supplied evidence in the Court of Hustings for the City of Portsmouth agreed that the approximately 338 books and magazines at issue did not constitute "hard core pornography," (A. 43, 57, 73, 84, 96-97). Since 1957, when this Court decided *Roth v. U.S.*, 354 U.S. 476, it has been recognized that sex and obscenity are not synonymous and constitutional protection has been afforded all literary materials not utterly without redeeming social value, *Memoirs v. Massachusetts*, 383 U.S. 413. In the case of *Redrup v. New York*, 386 U.S. 767, this Court, per curiam, in reaffirming the definition of obscenity in *Roth v. United States*, supra, as amended by this Court's subsequent decisions, considered three qualifications: (1) Protection of juveniles; (2) Assault upon individual privacy by publication in a manner so obtrusive as to make it impossible for an unwilling individual to avoid exposure to the erotic material; (3) Pandering of the material as described in *Ginzburg v. U.S.*, 383 U.S. 463. In the Court of Hustings for the City of Portsmouth, it was stipulated that the literary materials

at issue were not sold or distributed to juveniles, (A. 20). There was no testimony afforded, and there could not have been any testimony, regarding alleged pandering or obtrusive advertising. Petitioners argue that it is irrefutable that the approximately 338 books and magazines involved herein are, therefore, within the scope of the protection of the First Amendment to the Constitution of the United States of America. This Court has on numerous occasions re-emphasized this interpretation of the law of obscenity in per curiam decisions granting certiorari and reversing lower Courts citing only *Redrup v. New York*, supra. Of these recent decisions we should compare *Carlos v. New York*, 396 U.S. 119, reversing 24 N.Y.2d 86, 301 N.Y.S.2d 96, wherein the New York Court of Appeals had held the questioned material to be "hard core pornography." In the Court of Hustings for the City of Portsmouth, all of the testimony, the Commonwealth's evidence and the testimony elicited by the Defense, was that the approximately 338 books and magazines did not constitute hard core pornography, and did not vividly depict scenes of fellatio, cunnilingus, or coitus. Some of the books and magazines contained photographs depicting *simulated* erotic activities that suggest, but leave to the imagination, the consummation of the sexual activities. The photographic technique is superior and the books and magazines are protected by the First Amendment to the Constitution of the United States of America. Both the Court of Hustings for the City of Portsmouth and the Supreme Court of Appeals of Virginia, refused to consider this Court's decision in *Bloss v. Dykema*, 398 U.S. 273, reversing 17 Mich. App. 318, 169 N.W.2d 367, by condemning as obscene the magazines "Cover Girl" and "Exciting" which were the subject of the latter decision wherein this Court was again forced to apply the protection of the First Amendment to challenged literary material.

The Supreme Court of Virginia refused to make an independent judgment of obscenity or to consider this Court's action in *Burgin v. South Carolina*, No. 70-122, ___ U.S. ___, 30 L.Ed. 2d 39, reversing the Supreme Court for the State of South Carolina, 178 S.E.2d 325, in which opinion the South Carolina Court described the magazines, "Mirage," "Togetherness," "Fair Lady No. 1" and "Flesh Fantasy, Vol. II, No. 1", as follows:

> "... We have studied the material to make a de nova determination of obscenity vel non. We find that each of the four magazines is comprised almost totally of photographs which display nude young women in poses that center the attention of the viewer upon the vulva and surrounding area. They obtrusively expose the female genitalia in an obvious design to appeal to a prurient interest in sex. They serve no additional purpose except to produce revenue for the sellers. These magazines are a degrading, disgusting exploitation containing no pretense of artistic value. They cannot be permitted in a society which hopes to retain any semblance of constitutional and moral stability. The dissemination of this smut, which is utterly without redeeming social value, cannot be placed beyond the reach of the law. The argument that adults should be free to see and read what they want must be weighed in light of reality. Each time the First Amendment is stretched to include license to sell materials of the type involved in this action, a new flood of publications come into being. The benefits to society from freedom of speech and of press can best be protected by curbing license. Applying contemporary community standards, we find beyond a reasonable doubt the dominant theme of the magazines taken as a whole appeals to the prurient interests and are patently offensive and obscene in the constitutional sense. They are utterly without redeeming social value."

This Court had comparable books and magazines for consideration which depicted *simulated* sexual activities, in Case No. 71-443, *Wiener and Dulin v. California*,—— U.S.——, 30 L.Ed. 2d 539, in both of these cases, this Court on December 14, 1971, one month and three days prior to the action of the Supreme Court of Virginia herein, granted certiorari and reversed the judgment of the lower Courts, citing *Redrup v. New York*, supra. Petitioners argue that the First Amendment to the Constitution of the United States of America must be given effect in all fifty of our United States to protect the rights of the Petitioners to sell books and magazines which are not "hard core pornography", as well as the rights of the public, in all of our fifty states, to purchase and read literary material which is not obscene as defined by this Court and thereupon, the judgment of the Court below should be reversed.

III.

Whether the Display of Any Sexually Oriented Pictorial Magazines for Commercial Sale, When Surrounded by Notice to the Public of Their Nature and by Reasonable Protection Against Exposure of the Magazines to Juveniles, is Constitutionally Protected?

Petitioners assert the position that the display of any sexually oriented pictorial magazines for commercial sale, when surrounded by notice to the public of their nature and by reasonable protection against exposure of the magazines to juveniles, is constitutionally protected. Petitioners differentiate "hard core pornography" as defined by the Solicitor General of the United States, which definition was adopted by Mr. Justice Stewart in his dissenting opinion in *Ginzburg v. U.S.*, 383 U.S. 463 at 499,

"In order to prevent any possible misunderstanding, I have set in the margin a description, borrowed from the Solicitor General's Brief, of the kind of thing to which I have reference."

"... Such materials include photographs, both still and motion picture, with no pretense of artistic value, graphically depicting acts of sexual intercourse, including various acts of sodomy and sadism, and some times involving several participants in scenes of orgy-like character. They also include strips of drawings in comic-book format closely depicting similar activities in an exaggerated fashion...".

Petitioners distinguish the above defined "hard core pornography" from sexually oriented pictorial magazines, such as those involved in this case, which depict only "simulated" sexual activities. The magazines herein, in the main, consist of good to excellent professional photography of nude young adults, together with varying amounts of textual material. There are females alone, there are male and female couples; there are trios—two females and one male or two males and one female; there are quartets—two females and two males. They contain an indiscriminate mixture of races, negroes, male and female, and whites, male and female. The models have been photographed naked in a large variety of poses, postures, positions and arrangements. Their facial expressions range from utterly blank to apparently lively and rapturous. The genital areas are often conspicuously displayed in explicit and chromatic detail. Some photographs suggest that sexual activity is but inches and seconds away but the vivid depiction of actual fellatio, cunnilingus, pederasty, copulation, masturbation, coitus and any other subsiduary variation of those activities has been studiously avoided.

This Court in *Roth v. U.S.*, 354 U.S. 476, held that "hard core pornography" was not protected by the First Amendment to the Constitution of the United States of America. This decision was reaffirmed by this Court in *U.S. v. Reidel*, 402 U.S. 351, which silenced further argument upon that issue. However, the per curiam opinion of this Court in *Redrup v. New York*, 386 U.S. 767, prior to voicing the divergent opinions of the members of the Court, stated at 769,

> "In none of the cases was there a claim that the statute in question reflected a specific and limited state concern for juveniles. See *Prince v. Massachusetts*, 321 U.S. 158; cf. *Butler v. Michigan*, 352, U.S. 380. In none was there any suggestion of an assault upon individual privacy by publication in a manner so obtrusive as to make it impossible for an unwilling individual to avoid exposure to it. Cf. *Breard v. Alexandria*, 341 U.S. 622; *Public Utilities Commission v. Pollack*, 343 U.S. 451. And in none is there evidence of the sort of 'pandering' which the Court found significant in *Ginzburg v. U.S.*, 383 U.S. 463."

This Court laid to rest the issue of exposure of the sexually oriented pictorial magazines to juveniles in the case of *Ginsberg v. New York*, 390 U.S. 629, and it was stipulated in the trial below that the Petitioners' adult bookstore did no business with juveniles, (A. 20). There was no issue in the Court below, and there could be none, of obtrusive advertising, which concerned Justice Harlan in his separate opinion in *Roth v. U.S.*, supra, at Page 502,

> "And the State has a legitimate interest in protecting the privacy of the home against invasion of unsolicited obscenity."

It was to comply with this aspect of the law that adult bookstores block the public's view from the sidewalks into the bookstore so that it is impossible for a person who does not desire to view a nude photograph to pass the window of an adult bookstore and see any of the merchandise therein displayed for sale. This Court held in *Stanley v. Georgia*, 394 U.S. 557, that the individual has the right to enjoy any type of literature in the privacy of his own home. It is a physical impossibility for a citizen to produce his own erotic literature. In the Report of the Commission on Obscenity and Pornography, the Commission found as the content of "Adults Only" magazines, comparable to those involved in this case, "The posing of more than one model in a single photograph has resulted in the considerable amount of implied sexual activity, either intercourse or oral-genital contact, but neither actual sexual activity nor physical arousement of males is depicted at the present time." (Report of Commission on Obscenity and Pornography, September, 1970, Page 16). The Commission Report continues to state, "Combining all sources of information, the Commission estimates that twenty-five to thirty million "Adults Only" paperback books were sold in 1969 for a total retail value of $45 to $55 million; "Adults Only" magazines sales were approximately $25 to $35 million for 14 to 18 million copies. The best estimate is that "Adults Only" materials in the U.S. accounted for between $70 to $90 million in retail sales in 1969." (Report of the Commission on Obscenity and Pornography at Page 17). In describing the patrons of adult bookstores the Report of the Commission on Obscenity and Pornography stated at Page 21,

> "Patrons of adult bookstores and adult movie theaters may be characterized as predominantly white, middle-class, middle-aged, married males.

dressed in business suit or neat attire, shopping or attending the movie alone. Almost no one under 21 was observed in these places, even where it was legal for them to enter.

The average patron of adult bookstores and movie houses appears to have had fewer sexually related experiences in adolescence than the average male in our society, but to be more sexually oriented as an adult. The buyers of erotica report frequencies of intercourse fairly similar to those of nonconsumers, and report a similar degree of enjoyment of intercourse. Their high degree of sexual orientation in adulthood encompasses, in addition to pictorial and textual erotica, a variety of sexual partners and of sexual activities within a consensual framework. Activities most frowned upon by our society, such as sadomasochism, pedophilia, bestiality, and non-consensual sex, are also outside the scope of the interests of the average patron of adult bookstores and movie houses."

An analysis of the foregoing information leads to the conclusion that a substantial minority of the adult public of the United States desires the right to purchase sexually oriented pictorial magazines, which this Court should differentiate from hard core pornography, and which this Court should declare to be constitutionally protected.

While the Report of the Commission on Obscenity and Pornography recommends the repeal of all legislative regulation upon the sale of sexual materials to adults, Petitioners do not extend that far in this argument. Petitioners ask this Court to draw the line at hard core pornography as hereinabove defined and thereby balance the interests of the divergent groups. This would balance the right of Government to regulate the dissemination of sexually explicit materials against the rights of those

Americans who deeply value the right of each individual to determine for himself what books and magazines he wishes to read and what pictures he wishes to view. The tradition of free speech and press also value and protect the right of writers, publishers, and book sellers to serve the diverse interests of the public. We should not seek to interfere with these rights unless a clear threat of harm makes that cause imperative, since any censorship constitutes a threat to the free communication of ideas among Americans, the foundation stone of our liberties. And thereupon, Petitioners argue that the display for commercial sale of sexually oriented pictorial magazines, which are not hard core pornography, when there is no obtrusive advertising or sales or exposure of the materials to juveniles, should be constitutionally protected.

CONCLUSION

In summary, the approximately 338 books and magazines condemned by the Courts below, do not constitute hard core pornography, although several depict *simulated* erotic activities, without vividly depicting sexual action or congress and all of said books and magazines should be protected by the First Amendment to the Constitution of the United States of America, as made applicable to the State of Virginia by the Fourteenth Amendment to the Constitution of the United States of America. In addition thereto, this Court should strike down the Virginia Code provision as being repugnant to the Constitution of the United States of America in prohibiting a trial by jury thereby allowing a Judge, who is not insulated from transient community passions and prejudices, to decide the issue of obscenity on the basis of his own sensibilities based upon what he

considers "dirty" or "offensive", or upon his own indignation and disgust or upon possible extra-judicial pressure. The Virginia Code provision is also repugnant to the Constitution of the United States of America in permitting a prior restraint of literary material and in limiting the area for consideration of community standards of tolerance of erotic materials and in being vague and indefinite. Finally, Petitioners conclude that the display of sexually oriented pictorial magazines for commercial sale, when they do not constitute hard core pornography, and when there is due regard to protect the adult public from obtrusive invasions of privacy and where there is due regard to protect against exposure to juveniles, to be constitutionally protected.

Therefore, Petitioners respectfully urge this Court to reverse the judgment of the Supreme Court of Virginia and the Court of Hustings for the City of Portsmouth.

Respectfully submitted,

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